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IN THE

# Supreme Court of the United States

October Term, 1957

No. 476

FRITZ VON OPEL,

*Petitioner,*

—v.—

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Fritz von Opel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit of May 23, 1957, affirming the judgment of the United States District Court for the District of Columbia for respondent in an action under the Trading with the Enemy Act (40 Stat. 411), as amended (50 U. S. C. App. §1, *et seq.*), to recover the proportionate share of petitioner as stockholder of a Swiss corporation, in certain assets owned by the corporation before they were vested by respondent and his predecessors.

### Opinions Below

The opinion of the District Court after trial (R. 37) is reported at 133 F. Supp. 615, and two pretrial opinions

(R. 21, 34) are reported at 121 F. Supp. 420 and 127 F. Supp. 42. The opinion of the Court of Appeals (App. 1a-10a) is reported at 244 F. 2d 789.

## Jurisdiction

The judgment of the court below was dated and filed on May 23, 1957. A petition for rehearing was filed on June 7, 1957 and was denied by order dated and filed June 20, 1957. The jurisdiction of this court is invoked under §28 U. S. C. 1254(1).

## Questions Presented

1. Whether the court below correctly construed and applied *Kaufman* v. *Societe Internationale*, 343 U. S. 156, in holding that the petitioner, a non-enemy alien citizen of Liechtenstein, was an enemy tainted non-innocent stockholder of the Swiss corporation plaintiff and ineligible to recover his aliquot share of its assets vested by the Alien Property Custodian.

A. Whether as a matter of law all neutral or non-enemy alien stockholders, such as petitioner, are innocent stockholders entitled to recover under the *Kaufman* decision.

B. Even if neutral non-enemy individual stockholders may be classified as non-innocent stockholders under the *Kaufman* decision, whether on the facts of this case petitioner was so properly classified.

2. Whether petitioner on remand of this case by this Court (343 U. S. at 213) was erroneously denied a trial and determination of his property interests as a shareholder of the corporate plaintiff in erroneous reliance upon the dictum of the Court of Appeals upon the former appeal

(196 F. 2d at 560) as a valid predetermination of petitioner's lack of any property interest in the corporate shares.

3. Whether on the remand by this Court the trial court erroneously applied the doctrine of *res judicata* and the rules of conflict of laws to deny petitioner a trial *de novo* of his property interest in the corporate shares and the vested property under applicable Swiss law, and erroneously ruled that the property interests involved had already been conclusively determined under German law in the prior trial of the plaintiff corporation's interests.

4. Whether denial of the petitioner's claim *in toto* on the grounds relied upon in the trial court and the court below, and without a trial of the issue of his property interest in Uebersee's shares, denied the petitioner due process of law and took his property without just compensation in violation of the Fifth Amendment, and deprived petitioner of the exercise of free speech guaranteed by the First Amendment.

## Statute Involved

TRADING WITH THE ENEMY ACT, c. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-40):

Sec. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within

such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever

resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

* * * * *

Sec. 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

* * * * *

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return * * *.

## Statement of the Case

The petitioner, Fritz von Opel, a citizen of Liechtenstein since November 1939, was in the United States from 1940 to 1950 and at no time after December 7, 1941 during the war was he present in enemy territory. He was the sole ultimate stockholder of all of the 100 issued and outstanding shares of Uebersee Finanz-Korporation, A.G., a Swiss corporation, hereinafter called Uebersee (R. 5).[1] For many years before World War II Uebersee owned assets in the

[1] 97 of the shares were held for petitioner by Frima Trust Establishment of Vaduz, Liechtenstein, and 3 by members of Uebersee's Administrative Council as qualifying shares.

United States which were vested thereafter by the Alien Property Custodian and which consisted principally of the majority of the shares of common stock of the Harvard Brewing Company, engaged in the brewing and sale of beer, and the Spur Distributing Corporation, engaged in the sale of gasoline through retail filling stations.

Uebersee's vested assets were purchased with the proceeds of a gift of 600 shares of Adam Opel, A.G., a German automobile manufacturing corporation, to the petitioner from his parents, Wilhelm and Marta von Opel, German citizens residing in Germany, pursuant to the terms of a gift agreement of October 5, 1931 (App. 11a-12a). In the gift agreement the parents reserved a usufruct (called a niessbrauch in German law) in the Opel shares or their proceeds until the death of the survivor of them providing, however, that 20% of all dividends and interest accrued to the son, and further providing that if the son predeceases the parents without leaving legitimate issue the gift will become void and the property will revert to the parents.[2] The Opel shares were sold to General Motors Corporation in 1931 and shortly thereafter the proceeds were invested in the United States principally in the vested Harvard and Spur shares which were held by Uebersee (R. 63).

In 1942 the Custodian vested the American assets of Uebersee and it instituted this action under §9 of the Trading with the Enemy Act to recover them asserting in its complaint that it was a neutral Swiss corporation not owned or controlled by statutory enemies. The dismissal of the complaint upon the Government's contention that a 1941 amendment of the Act withdrew access to the courts by citizens or corporations of neutral countries and relegated them exclusively to an administrative remedy was

[2] Wilhelm von Opel died in 1948 and Marta von Opel survives.

reversed by this Court which reinstated the complaint in *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U. S. 480, hereinafter called Uebersee I.

Upon remand and trial of the corporate plaintiff's cause of action this Court affirmed the judgment of the lower courts against the corporate plaintiff on the ground that the corporation was an enemy not entitled to recover by virtue of its "enemy taint" because of alleged ownership and control of the corporation by statutory enemies, Wilhelm and Marta von Opel, through their usufruct for life in the corporation's shares. *Uebersee Finanz-Korporation* v. *McGrath*, 343 U. S. 205, hereinafter called Uebersee II. Upon the trial of Uebersee's cause of action the petitioner, Uebersee's shareholder, had not been allowed to prove his asserted separate interest, apart from his parent's usufructuary interest, in the corporation's shares and in the vested assets. On the same day that Uebersee II was decided, April 7, 1952, this Court also decided *Kaufman* v. *Societe Internationale*, 343 U. S. 156, holding that an innocent stockholder of an enemy tainted neutral corporation could maintain an action to recover his proportionate share of the vested assets. In view of this novel holding in the *Kaufman* case this Court in Uebersee II vacated the judgment below and remanded the case to the District Court for consideration of any application by the petitioner, Fritz von Opel.

Upon remand petitioner was allowed to intervene as a plaintiff and filed his complaint alleging that he was a neutral alien entitled to recover all of the vested property or, alternatively, that part of the vested property determined not to be beneficially owned by the petitioner's parents (R. 4-6). The respondent's answer denied the petitioner's allegations that he was a non-enemy and was entitled to all or that part of the vested property not bene-

ficially owned by enemies, and asserted as a seperate defense that the petitioner was bound and concluded, as a matter of *res judicata*, by the findings of fact, conclusions of law, and all the adjudications theretofore made in the action on the ground that petitioner controlled the litigation on behalf of the plaintiff corporation and had an interest in the corporation's cause of action (R. 8). The respondent asserted this separate defense in two pretrial motions which were granted by the District Court which in its first pretrial opinion ruled inadmissible on the trial of the petitioner's cause of action any evidence which tends "to contradict or vary the findings of fact and conclusions of law hitherto entered" (R. 31, 121 F. Supp. 420) and in its second pretrial opinion declared "inadmissible on further trial expert testimony on Swiss law as to the value of intervener's severable interest" (R. 35, 127 F. Supp. 42).

The petitioner's cause of action was tried subject to the limitations of the District Court's two pretrial opinions and findings of fact (Fdgs. 57-105, R. 72-85) and conclusions of law (Conc. 7-16, R. 86-88) were made supplemental to the original findings (Fdgs. 1-56, R. 60-70) and conclusions (Conc. 1-6, R. 71) made upon the former trial of Uebersee's cause of action. The trial court determined that petitioner could recover no part of the vested assets since he was "enemy tainted" in that since his interests in Uebersee's shares were held "primarily on behalf of and for the benefit of enemy nationals, such interests are enemy tainted and may not be recovered by him" (R. 47-48). The Court of Appeals (App. 6a) affirmed the determination that the petitioner could not recover any part of his interest because of the enemy usufructuary interest in the shares of which petitioner was the legal owner and because of petitioner's participation in the alleged establishment of the usufruct. The Court of Appeals also affirmed the pretrial decision of the trial court that petitioner was bound

by the findings and conclusions made upon the former trial of Uebersee's cause of action and was limited to the introduction of supplementary but not contradictory evidence (App. 8a). Petitioner seeks review of the correctness of these rulings of the courts below.

The District Court also determined as an independent ground of decision that petitioner was not merely enemy tainted but also was a statutory enemy as an individual resident outside of the United States and doing business within the enemy territory of Hungary (R. 38-44) and overruled the petitioner's contention that this issue was outside of the pleadings and the pretrial and was brought into the case for the first time during the trial to petitioner's surprise (R. 54). The District Court, in the event that petitioner on appeal be held eligible to recover, also ruled that his interest as legal owner of the property subject to the usufruct was without present value during the life of the surviving usufructuary but that his interest as survivor upon the death of the usufructuaries is a present interest which does have value (R. 57-58). In view of its disposition of the appeal on the two grounds that petitioner was governed and limited on the trial of his cause of action by the findings and conclusions made on the trial of Uebersee's cause of action and on the original and supplemental record was enemy tainted, the Court of Appeals refused to rule either on the question of petitioner's status as a statutory enemy by reason of allegedly doing business in Hungary, or on the value of petitioner's interest in the property subject to the usufruct, or on the question whether that value should be determined by Swiss law, as petitioner contended, or German law as the trial court ruled.

Finally, the District Court rejected petitioner's contention that under German law 20% of the property in any event belonged to him outright and was not subject to the

usufruct at all and should be returned to him as a statutory non-enemy. The District Court, however, relying not on evidence of German law but on the view that it was bound by a construction of the text of the gift agreement by the Court of Appeals on the former appeal (89 U. S. App. D. C. at 170, 196 F. 2d at 560) ruled that petitioner had merely a contractual right against his parents for 20% of the income not recoverable in this action and no *in rem* interest in 20% of the gift or its proceeds (R. 59). The petitioner argued in the court below that it was error to determine his rights upon this construction of the contract by the Court of Appeals on the former appeal as a matter of American law rather than by findings of fact based on the expert testimony of German law which was offered, but the court below made no reference to this point in its opinion. Since the decision of the Court of Appeals that petitioner's interest *subject to the usufruct* was enemy tainted did not dispose of petitioner's contention that 20% of the property was not subject to the usufruct, a petition for rehearing on this ground was filed but the petition was denied without opinion.

## Reasons for Granting the Writ

The petitioner submits that the reasons for granting the writ are the rulings of the court below affirming the trial court in respect of petitioner's alleged enemy taint and the application of the doctrine of *res judicata* to limit the trial of plaintiff's cause of action and the ruling that the petitioner had merely a contractual right against his parents for 20% of the gift or its proceeds not recoverable in this action instead of 20% of the vested property which petitioner contends was not subject to the usufruct and may be recovered even if his interest in 80% of the vested property is enemy tainted. The petitioner submits that the inde-

pendent ground of decision in the District Court not ruled upon by the court below, petitioner's enemy status as allegedly doing business in Hungary, and the ruling determining the value of his interest by German rather than by Swiss law, might be referred to the court below for consideration before being passed upon by this Court if it be held that the court below erred in the rulings it did make.

1. *Innocent stockholder and enemy taint.*—The court below and the trial court decided this case principally, if not solely, upon their construction and application of this Court's novel and far-reaching *Kaufman* decision, *supra*. The court below adjudged petitioner, a citizen of neutral Liechtenstein and for purposes of discussion of this point not an enemy within the definitions of §2 of the Act, to be ineligible to recover any part of his patrimony invested in United States securities solely because of an extension of the judicial doctrine of "enemy taint" beyond enemy dominated corporations to include a citizen of a neutral country or his property in which there is an enemy interest. The petitioner submits that this decision of the court below is in conflict with this Court's *Kaufman* decision and in addition erroneously decides an important question of federal law which should be settled by this Court.

This appears to be the first reported case of the application of this Court's general legal standard of "innocent stockholder" to deny an individual neutral citizen stockholder the return of his share of a neutral corporation's assets seized and retained on the ground of an enemy interest in the corporation. The *Kaufman* decision does not define "innocent stockholder" other than to indicate that it means a stockholder who is "not an enemy *as defined in Section 2*". (343 U. S. 160, emphasis supplied). The consequences of permitting the court below, without review by this Court, to extend this Court's definition of "innocent

stockholder" to exclude therefrom non-enemy aliens who are not enemies as defined in §2, such as petitioner, will be not merely to confirm confiscation of petitioner's valuable property rights but also possibly to deny many other neutral citizen shareholders any recovery of a portion of seized corporate assets until another opportunity arises for this Court to define further the meaning of "innocent stockholder." In the interests of the administration of justice such further definition should be provided by review in this case.

The petitioner submits that it may be demonstrated that the court below misunderstood the legal definition of "innocent stockholder" in *Kaufman* and, moreover, misapplied the correct legal definition of "innocent stockholder" to the facts of this case.

A. *Legal meaning of "innocent" stockholder.*—The court below states (App. 9a):

> "Reference in *Kaufman* and *Uebersee* to the right of one not an enemy as defined in section 2 to recover does not convey the full meaning of *Kaufman*. As we construe that decision, insofar as here pertinent, non-enemy status alone is insufficient, in the case of a stockholder of an enemy tainted neutral corporation, to entitle him to recover assets of the corporation commensurate with his stock ownership."

The petitioner submits that the reference in this Court's opinions in *Kaufman* and *Uebersee II* to the right of one not an enemy as defined in §2 to recover his interests does convey the full meaning of this Court and the extension of the *Kaufman* decision by the court below should be reviewed and corrected by this Court. *Kaufman* was decided in the light of *Guessefeldt* v. *McGrath*, 343 U. S. 308, which determined that it was the intent of Congress to

restrict the basic test of "enemy" for purposes of the Act to residence in enemy territory and not to extend it even to enemy nationals living elsewhere despite the language of §39 of the Act. The *Kaufman* opinion expressly states that the question presented was "What part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the stock is owned by enemies, part by American citizens, and part by non-enemy aliens?" (343 U. S. 158). The Court further stated that a stockholder's right to recover "is based on the Act which enables one not an enemy *as defined in Section 2* to recover any interest, right or title which he has in the property vested" (343 U. S. at 160, emphasis supplied). The opinion throughout distinguishes between "enemy" and "non-enemy" stockholders and not between "innocent" and "tainted" stockholders and thus emphasizes that the legal distinction between eligible and non-eligible stockholders is found in the statutory definitions of "enemy" in §2. The dissenting opinion adopted and confirms this construction of the Court's opinion by pointing out that recovery is allowed by stockholders "not covered by the definition of enemies" (343 U. S. at p. 164).

The petitioner's construction of the *Kaufman* decision, classifying non-enemy stockholders as innocent stockholders and not enemy tainted stockholders, is also supported by judicial authority generally which has not extended the doctrine of enemy taint, devised to deal with enemy dominated neutral or domestic corporations, to individual citizens of neutral nations. *Re Badische Co., Ltd.* [1921] 2 Ch. D. 331, 371.[3] The prize cases utilize the same concept of

[3] The Court of Appeal stated the test (p. 371): "The true test is control, the analogue of that residence which invests an individual residing in an enemy country with enemy character." See also *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916] 2 A. C. 307; *H. P. Drewry, S. A. R. L.* v. *Onassis*, 266 App. Div.

enemy taint of ships or cargo owned or controlled by enemies but do not extend the concept of enemy taint to individuals. *The Buena Ventura*, 175 U. S. 385; *The Wren*, 73 U. S. 582; *The Venus*, 8 Cranch 251.[4]

Nothing in the text, legislative history, or policy of the Act supports extension of the doctrine of enemy taint, devised to deal with enemy dominated corporations, to neutral citizen stockholders of enemy tainted corporations. The rule in the *Daimler* case, *supra*, determining enemy status of a domestic corporation by enemy residence of its directors and stockholders, was considered but not adopted in the Trading with the Enemy Act enacted on October 6, 1917. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 467, 472. Section 2(a) defining "enemies," read together with §2(c), clearly indicates that Congress did not intend that a new class of individual enemies be created by extending the doctrine of enemy taint to individuals. In §2(c) Congress expressly provided the manner in which the class of statutory enemies defined in §§2(a) and 2(b) might be expanded by proclamation to include natives, citizens or subjects of an enemy nation wherever resident or doing business other than citizens of the United States.[5] This

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292, affirmed 291 N. Y. 779; *Fritz Schulz, Jr. Co.* v. *Raimes & Co.*, 100 Misc. 197, 166 N. Y. Supp. 567 (Irving Lehman, *J.*); *Overseas Trust Co., Ltd.* v. *Godfrey* [1940] 177 South African Law Reports, Cape of Good Hope Provincial Division 185; *Re G. Hardt & Co. Pty., Ltd.* [1940] 13 Australian L. J. 167; Cohn, *German Enemy Property*, International Law Quarterly, Vol. 3, p. 548 (1950).

[4] See also *Part Cargo ex. M. V. Glenroy* v. *Spencer* [1945] A. C. 124; *The Hamborn* [1919] A. C. 993; *The Proton* [1918] A. C. 578; Hackworth, VI *International Law*, 512.

[5] Petitioner, a native of Germany, could have been included within the class of enemies by proclamation under this section of the Act, but this was not done. This power was invoked by Presidential Proclamations of February 5 and May 31, 1918 (40 Stat. 1745, 1786) but not during World War II. *Ex Parte Kawato*, 317 U. S. 69, 76.

express provision, which was not exercised, strongly implies that Congress did not intend that the definition of "enemy" should be expanded by the judicial extension of the doctrine of enemy taint to neutral citizens.

Section 32(a)(2)(E) of the Act (cited in *Uebersee I*, 332 U. S. at p. 490), prohibiting voluntary administrative return to any foreign corporation "which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned" by enemies, recognizes the doctrine of enemy taint of corporations but there is no comparable provision for individuals. In the absence of such a provision for individuals this legislation, of a penal and confiscatory character, should not be extended by the judicial creation of a class of "enemy tainted" individuals which cannot be defined with any reasonable precision in the absence of statutory standards.

Grave practical considerations weigh against the construction of the Act adopted by the court below. Taint of a neutral corporation can be determined by application of judicially known standards of "ownership" and "control" of a corporation by enemies. But in the absence of legislation what standards are available to adjudge enemy taint of a neutral citizen who cannot be said to be "owned" or "controlled" by enemy nationals? If enemy sympathies were the test what degree of sympathy would constitute taint? And could sympathies prior to December 7, 1941 with a nation or its residents thereafter made enemies by commencement of war retroactively establish enemy taint of an individual even though apparently a corporation may be enemy tainted only by enemy ownership or control "after December 7, 1941" (§32(a)(2)(E))? And is an "enemy tainted" individual to be considered tainted only in respect of his share of the tainted corporation's vested assets or also in respect of all of his individual property

in the United States? The statutory scheme is based on definitions of enemies and not of enemy property and it is difficult to believe Congress tacitly intended confiscation of all the property in the United States of neutral citizens found to have a tainted investment in an enemy tainted corporation.

Moreover, the lower court's concept of enemy taint of an individual is not and cannot be restricted to citizens of neutral countries but applies equally to American citizen stockholders in foreign corporations having other stockholders who in the course of wartime future events became enemies. It cannot be thought that Congress, which has substantially encouraged American investments abroad by tax concessions (for example, Internal Revenue Code of 1954, §922) and even by government insurance against confiscation by foreign governments (§413 of the Mutual Security Act of 1954, as amended, 22 U. S. C. §1933), intended the Trading with the Enemy Act to be construed to subject American investors to domestic confiscation in the event of unforeseen war. Such a result should be avoided by review and correction of the decision of the court below and the affirmation that the *Kaufman* decision means what it says, namely, that non-enemy stockholders are innocent stockholders eligible to recover their share of the vested assets of an enemy tainted foreign corporation.

The present Congress is currently considering amendments to the Act (S. 411, 600, 727, 1302, 85th Cong., 1st Sess.), and the creation of any class of enemies by taint is more appropriately a legislative matter than a judicial task.

Finally, on this point the petitioner submits that the broad construction of the Act and of the *Kaufman* decision adopted by the court below should be rejected in order to avoid serious constitutional questions under the First and

Fifth Amendments. If Congress has authorized confiscation of the corporate investments of citizens of neutral nations, present in the United States all during the war, and even of United States citizens, a serious question of taking private property without due process of law or of just compensation is raised. Such construction of the statute should be avoided. *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319. Moreover, if enemy taint of an individual in the United States is based in whole or in part on his pre-war expression of sympathy for his native land which subsequently becomes an enemy nation, the absolute guarantee of freedom of speech is violated. *United States* v. *Ballard*, 322 U. S. 78, 86; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Cantwell* v. *Connecticut*, 310 U. S. 296, 301-304. These issues should be avoided by construing the Act and the *Kaufman* decision to mean that non-enemy aliens are innocent stockholders and are not enemy tainted and may recover their share of vested corporate assets.

B. *Factual basis of "enemy taint" or "non-innocence".*— Even assuming *arguendo*, that the court below has correctly construed *Kaufman* and the statute as extending the doctrine of enemy taint beyond enemy dominated corporations and to include individual non-enemy alien stockholders found to be "non-innocent" or "tainted," the petitioner submits that such finding is erroneous on the facts of this case. The court below stated at various places in the opinion (App. 6a, 7a, 9a):

> "The *Kaufman* principle here pertinent presupposes that the interests held by the intervening stockholders will be free and clear of enemy taint once they are separated from the corporate entity, while intervener's interests were tainted even when separated from Uebersee, as the taint reaches the corporation through his shares rather than reaching his shares through

> the corporation. Nor did the enemy control over the American business enterprises arise entirely by the acts of others, as was alleged in *Kaufman*. The facts previously set out show that intervener through his arrangement with Wilhelm and Marta von Opel was part and parcel of the means by which the effective control of Wilhelm over the vested property was secured. * * * The nature of that [usufructuary] right, the resulting control over the corporation, and intervener's active participation in the events which led to establishment of the right cause us to hold that intervener is not an innocent stockholder. * * * Intervener is not within *Kaufman* because his association with the enemy taint of the corporation in which he holds his stock was a non-innocent association."

The petitioner asserts that nothing stated in the *Kaufman* opinion supports the distinction sought to be drawn by the court below and that in fact petitioner's conduct in relation to the usufruct, long before December 7, 1941 and beginning in October 1931, does not establish enemy taint or a non-innocent association warranting confiscation of his interest.

Assuming *arguendo* that petitioner was bound by the findings on Uebersee's trial concerning the existence and extent of the usufruct and was not entitled to a trial *de novo* on the extent of his property right in Uebersee's share of the vested assets under Swiss law (but see *infra*, p. 21), nevertheless even the facts as found on the trial below and the former trial do not establish petitioner's enemy taint or non-innocence.

The facts which deserve emphasis are that even in 1931 the petitioner was opposed to the reservation of a parental usufruct in the gift which was made to him to provide for

him financially out of the proceeds of the sale of the family business in which he had been employed (R. 63, 238). The petitioner naturally, albeit reluctantly, accepted the gift subject to the condition the donors required and he invested all the proceeds in the United States in reliance upon the economic and legal stability of investments here and he repatriated none of these funds to Germany where they originated. Surely no taint or censure can be leveled at petitioner because in 1931 his parents chose to reserve a life interest in 80% of the income which ten years later, upon outbreak of war, became an enemy interest.

It is also significant on any issue of factual taint or innocence that the usufruct was never concealed but, on the contrary, its existence was asserted in litigation with the Government in the *Gold* case (Fdgs. 47-50, R. 68-69). *Uebersee Finanz-Korporation* v. *Rosen*, 83 F. 2d 225 (C. A. 2), cert. den. 298 U. S. 679.[6] No effort was made to conceal or alter the usufruct after the beginning of World War II in Europe on September 1, 1939 in contemplation of the entry of the United States into the war two years later.[7]

This case is wholly different from cases in which enemy interests were concealed or in which the enemy made a

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[6] In the *Gold* case the courts held that the applicable Treasury regulations governed export of all gold from the United States whether or not the owners were here and therefore it was not necessary to decide the question whether the ultimate "owner" of the gold in question, purchased by Uebersee, was the petitioner stockholder who was present in the United States or his parents, the usufructuaries, who were not in the United States.

[7] Uebersee failed in its contentions upon trial (1) that prior to 1939 the usufruct *in rem* had not been established because of petitioner's separate access to the safe deposit box in which the shares were deposited and the consequent lack of the necessary co-possession of the shares by the usufructuaries; (2) that co-possession was lost when the shares were sold subject to repurchase; and (3) that co-possession had been waived.

transfer during the war in contemplation of seizure.* The American management of the Spur and Harvard companies, in which the proceeds of the gift were principally invested, was continued by Uebersee and also after vesting by the Custodian who apparently was entirely satisfied with the loyalty of the American managers formerly utilized by Uebersee. *Annual Report of the Custodian for the Year Ending June 30, 1945*, p. 89.

Uebersee was held to be enemy controlled and denied any recovery upon the finding upon the first trial that it was controlled by Wilhelm von Opel's agent until 1940 and the continuation of this control until after December 7, 1941 was inferred in the absence of any evidence of control after 1940 (Fdg. 40, R. 66-67). After the second or supplemental trial of petitioner's interest the trial court added in its opinion, but not in its findings, that in view of the paramount and controlling usufructuary interest petitioner held his subordinate interest primarily for the benefit of the usufructuaries and therefore was tainted (R. 46-48). Thus Uebersee's claim of very substantial property interests was first rejected on the ground that petitioner, a non-enemy stockholder, did not control its affairs. Control by the enemy after 1940 in the absence of any evidence was supported solely by an inference of continuing control assertedly established by evidence of enemy control up to 1940 (R. 66-67, Fdg. 40). And now petitioner's claim is rejected because of his merely passive and subordinate interest. It is submitted that the courts should not on the one hand deny Uebersee any recovery on the ground that its non-enemy stockholder had a subordi-

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* *Beck* v. *Clark*, 182 F. 2d 315 (C.A. 2); *Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C.A. 2), cert. den. 333 U. S. 873; *Kaneme Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), cert. den. 337 U. S. 973; *American Transatlantic Co.* v. *United States*, 83 F. Supp. 832 (Ct. Cl.); *Draeger Shipping Co.* v. *Crowley*, 55 F. Supp. 906 (S.D.N.Y.).

nate and passive interest and that the usufructuaries' interest was dominant and paramount and then deny the stockholder any recovery of his subordinate and passive interest merely on the ground that it is associated with the dominant usufructuary interest. Under any fair and reasonable test of enemy taint or non-innocence of a non-enemy alien stockholder these facts do not establish guilty taint or non-innocence.

The trial court went even further than the court below and held that petitioner's activities, wholly apart from Uebersee and prior to coming to the United States in 1940 and long before Germany became an enemy on December 7, 1941, promoted "enemy" interests and constituted enemy taint barring recovery (R. 54). This reliance on activities long before the war and not related to the vested property discloses the extent to which the doctrine of enemy taint or non-innocence can be applied to confiscate private property in the absence of an authoritative ruling by this Court and indicates a need for further review in this case.

The petitioner submits that this Court should determine in this case whether non-enemy alien stockholders can be denied recovery as non-innocent or tainted stockholders and if so whether petitioner is in such a category on the facts of this case and must be denied any recovery of his interest because of the reserved parental usufruct in his shares.

2. *Petitioner's property rights not subject to the usufruct.*—Even if the court below correctly construed the *Kaufman* decision so that petitioner is a non-innocent stockholder and cannot recover any part of his property interest *subject to the usufruct,* nevertheless he has been denied recovery of his interests in the proceeds of the parental gift which were *not* subject to the usufruct and which, as a non-enemy alien, he is entitled to recover. Therefore the

erroneous decision below denying him recovery of any interest whatever in the vested property is a serious misapplication of the Act and a violation of the order of this Court granting him a trial of his cause of action on remand of the case which should be reviewed and corrected by this Court.

If the dictum of the court below was correct that petitioner had merely a contractual claim against his parents for 20% of the income not enforceable against the property (196 F. 2d 557), then the remand was nugatory and fruitless. If it had already been finally determined that petitioner had no interest in the property why allow him to intervene to determine his rights which were already determined? Even if the courts below had adopted petitioner's contentions that he is an eligible innocent stockholder claimant he would have been denied any recovery on the ground that it had already been determined that he had no interest in the vested property. If the prior dictum of the court below was binding on petitioner the case and the other issues were moot and there was no reason to remand the case to determine whether petitioner was or was not eligible to recover nothing.

The petitioner submits that even the most cursory review of the proceedings in Uebersee's trial and in the petitioner's trial make it clear that he has been wholly denied a trial of the extent of his interest in the gift not subject to the usufruct solely on the basis of the erroneous conclusion of the trial court on petitioner's trial (R. 59) that a dictum of the court below on the former trial (89 U. S. App. D. C. 167, 196 F. 2d 557) foreclosed this issue and required the exclusion of the petitioner's expert testimony that under German law his parents had a usufruct in only 80% of the gift and the petitioner retained 20% of the gift

and the income therefrom not subject to the usufruct (R. 529, 535).

Examining the course of the case chronologically it appears that upon Uebersee's trial numerous issues were presented concerning Uebersee's taint, including the nature of the enemy usufruct in its shares. But the interest of petitioner, not then a party to the action, in Uebersee's shares was not involved or tried.[9] On Uebersee's trial the trial court rejected all of the Government's contentions that the gift was a sham, that the gift was illegal, and that Uebersee was an enemy because it did business in enemy Hungary or because its stockholder, the petitioner, was a German national or an agent of the German Government (U.R. 42-44,[*] 82 F. Supp. 602, 604). The trial court found that the gift was bona fide and valid and intended to make financial provision for petitioner and that petitioner owned the entire property subject only to a contractual obligation to his parents to establish a usufruct *in rem* in the property to secure their interest in 80% of the income for life (Fdgs. 32-33, R. 65). The trial court, however, accepted the Government's remaining contention that the petitioner did establish a usufruct *in rem* in the shares in 1935 by depositing them in his safe deposit box in Switzerland and by giving a key thereto to his parents' agent as symbolic delivery of co-possession of the shares which was a prerequisite under German law for establishment and main-

[9] Upon Uebersee's trial, beginning December 8, 1948, the petitioner's rights could not have been recognized in the District Court because it was not until April 7, 1952 that this Court in the *Kaufman* decision, *supra*, reversed the decisions of the courts below (90 F. Supp. 1011, affirmed 188 F. 2d 1017) that stockholders had no standing to assert their rights apart from the corporations involved.

[*] References to the record on Uebersee's appeal are designated U.R.

tenance of a usufruct *in rem* (Fdgs. 34-38, R. 65-66).[10] On Uebersee's trial neither the findings of the trial court (R. 65-70) nor its opinion (82 F. Supp. 602) undertook to define the petitioner's interest in the shares but were devoted entirely to defining the nature of the usufructuary interest, and the principal finding was quoted in the opinion of this Court (343 U. S. at 208). In its opinion the trial court states that the gift agreement created a right in the Opel parents "to receive 80% of the income from the American securities" (U.R. 47, 82 F. Supp. at 605) but makes no reference at all to petitioner's rights. The trial court's findings are also devoid of any definition of petitioner's rights and there is merely a reference to petitioner's affidavit prepared by counsel in the former *Gold* case litigation in which it stated that he had legal title to Uebersee's shares and a right to 20% of the income. The trial court not only did not determine petitioner's rights in Uebersee's shares but also expressly refused to consider them stating in the opinion that the action was not brought by petitioner and that his rights were not presented by the pleadings (U.R. 50-51, 82 F. Supp. 602, 607). It is hard to imagine a record in which it more clearly appeared that rights were not adjudicated than the record upon Uebersee's trial in respect of petitioner's property rights.

Uebersee argued on its appeal to the court below that, among other grounds, the case should be remanded to the trial court for a determination of petitioner's interests in the property but the court below in its opinion made no

[10] Neither Uebersee, nor petitioner on his trial, obtained any expression of judicial opinion in any court upon the contention that the petitioner's separate access to his personal safe deposit box in which the shares were deposited prevented the co-possession necessary for maintenance of a usufruct under German law (U.R. 816, 857, 2060, Uebersee brief in this Court on former appeal, p. 27, R. 916, 934, 944-5).

reference to this argument (U.R. 2326, 196 F. 2d 557) and Uebersee moved for a clarification of the court's opinion on this ground, among others. For the first time in its memorandum opinion on the motion (U.R. 2333, 196 F. 2d 560) the court below summarily disposed of petitioner's important property rights by stating that the gift agreement provision that "20% of all dividends and interest received will accrue to Fritz van Opel" (App. 11a), gave him merely a contractual right against his parents and no rights *in rem* in the property. This ruling, in answer to Uebersee's request that the case be remanded for the trial of this issue, was not based on any finding of German law or any determination whatever of the trial court, and the language of the court below indicated plainly that it thought the matter "clear" on the face of the provision and not on any evidence of German law.[11]

This Court upon the former appeal did not accept this construction of the gift agreement by the court below as giving petitioner merely a contractual claim against his parents but on the contrary stated that petitioner had "the right to 20% of the income *from the property*" (343 U. S. at 210, emphasis supplied) and this Court repeated that petitioner had the "right to receive 20% of the income *from the usufruct property*" (343 U. S. 211, emphasis supplied). These expressions by this Court make it evident that at least the question whether petitioner had an interest in the property or only a contractual claim against his parents was not as clear as the court below thought it was on the face of the gift agreement and it was an issue to

[11] It is true that in discussing the various possible interpretations of the gift agreement the German law experts made passing references to alternative possibilities (U.R. 308-311, 315, 316, 1328, 1388-1389) but the trial court in refusing to consider petitioner's interest in the property made it clear that it did not think that evidence had been offered on this issue (R. 23, 26-27).

be tried and determined when this Court remanded the case for determination of petitioner's rights.

On remand, however, the trial court sustained the Government's objection (R. 529) that the Court of Appeals' dictum foreclosed the issue and excluded (R. 535) the petitioner's expert testimony that the usufruct was restricted to 80% of the property and that petitioner was entitled to 20% of the property and the income therefrom free of the usufruct (R. 529-530, 914, 118). The Government, as an alternative to its objection to evidence on the point, offered expert testimony that petitioner had merely a contract claim against his parents (R. 606). But the trial court never decided the question on its merits and affirmed its ruling excluding the evidence by stating in its opinion that it was bound by the "finding" of the Court of Appeals on the former appeal although that misnamed finding was demonstrably a dictum not based upon any evidence or any finding by the trial court on the first trial either in its formal findings or opinion. The trial court foreclosed the matter as follows: "This finding is binding on the Court" (R. 59). Thus remand of the case to determine petitioner's rights was in vain because the trial court ruled that it had already been determined that he had no rights in the vested property.

On appeal to the court below petitioner urged that he was entitled to a trial on the issue. The opinion of the court below made no reference to the point and the petition for rehearing on this point was denied without opinion.

It is unquestioned and it has been found as a fact, on the basis of the expert testimony on German law, that the gift agreement gave petitioner the *entire* property subject only to a contractual obligation to establish a usufruct *in rem* to secure his parents' right to 80% of the income for life. The usufruct *in rem* found to have been estab-

lished by petitioner gave the parents substantial rights. But it should not be held without a trial of the issue, solely on the basis of the dictum of the court below relying on the face of the German gift agreement, that upon establishing the usufruct the petitioner stripped himself of the entire property interest and had nothing left but a contractual right against his parents for 20% of the income not enforceable against the property. If the parental usufruct *in rem*, limiting the concededly complete property in the gift which petitioner had between 1931 and 1935, was correctly determined not from the face of the gift but by expert testimony on German law, then equally the petitioner's remaining property interest in the gift should be determined upon a trial of the issue under applicable foreign law.

The denial of a trial of this issue was contrary to the judgment of this Court remanding the case for a determination of petitioner's rights and should be reviewed and corrected. The remand was fruitless if the prior dictum of the court below was controlling and was correctly applied to deny petitioner a trial of the issue of his interest in the property.

3. *Misapplication of res judicata.*—Independently of the two reasons for granting the writ discussed above, the ruling of the trial court sustaining the Government's separate defense set forth in its answer (R. 8) and granting its motion (R. 32) to limit petitioner's evidence upon an application of the doctrine of *res judicata* (R. 21-31), denied petitioner the trial *de novo* which the remand by this Court granted.

Upon the remand the petitioner contended that he was entitled not only to a trial and determination of his property interest in Uebersee's shares, assuming he was bound

by the prior determination of the existence and continuation of the usufruct *in rem* in the shares, but also to a trial *de novo* even on the existence and extent of the usufruct under Swiss law on the ground that he was not a party to Uebersee's trial of this issue under German law. The trial court denied petitioner a trial of his separate interest in the property, assuming the existence of the usufruct, on the ground of the dictum of the Court of Appeals that he had only a contract right against his parents for 20% of the income, discussed *supra*, and also on the ground of *res judicata* even though this issue was never tried (R. 29-30).

The trial court also denied petitioner a trial *de novo* on the issue of the existence and continuation of the usufruct under Swiss law on the ground of *res judicata*, and it also ruled in a separate pretrial memorandum opinion, granting the Government's motion to declare inadmissible expert testimony on Swiss law as to the division of property interests between the petitioner and the usufructuaries (R. 36), that the value of their interests was governed solely by German law even though the usufruct was established in shares of a Swiss corporation physically located at all times in Switzerland (R. 34-35). The trial court permitted evidence and made findings of the value of petitioner's interest under German law but solely on the basis of the former findings concerning the usufruct *in rem* and the dictum of the Court of Appeals during the usufruct petitioner was limited to a contractual claim against the usufructuaries for 20% of the income. The trial court made no findings on petitioner's proffered evidence (R. 534-535, 913-986) that under Swiss law, properly applicable to the establishment of a usufruct *in rem* in Swiss shares located in Zurich, Switzerland, rather than under German law, a usufruct *in rem* was not established or maintained because petitioner had at all times retained separate access to his

personal safe deposit box in which the shares were deposited and the Swiss law is that co-possession of the shares without separate access by the legal owner is necessary to maintain a usufruct *in rem* (R. 932-933, 944-945).[12] The petitioner submits that Uebersee's trial of the existence of the usufruct, as one of the numerous issues which were presented on Uebersee's trial, was not a trial of petitioner's interest in the property as is plainly indicated by the lack of any determination of petitioner's interest in the orginal opinion and findings of the trial court (82 F. Supp. 602, R. 60-70).

The court below affirmed the denial of a trial of petitioner's interest in the property insofar as it required a reexamination of the issue of the enemy interests in the property on the ground that petitioner controlled Uebersee's trial and was bound by the determination of the enemy usufruct in the property, which apparently inferentially determined petitioner's remaining interest in the property. The court below expressly rejected petitioner's contention

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[12] In order to prove that the usufruct *in rem* was not maintained under Swiss law petitioner offered evidence not available on Uebersee's trial in the form of depositions of Dr. Paul F. W. Gmuer, an expert on Swiss law (R. 927-986) and of Dr. Ulrich Hoche (R. 913-927) a German law expert, who testified that German courts would apply Swiss law to determine establishment of a usufruct in Swiss shares located in Switzerland. The petitioner also offered the depositions of Dr. Hegetschweiler (R. 859-878), Dr. Meier (R. 879-884) and Mr. Gaeng (R. 895-913) which supplied facts concerning the deposit of the shares in a safe deposit box and access thereto which was in part the factual basis for the expert testimony on Swiss law. All of these depositions were marked as intervener's Exhibit 18 for identification but not in evidence and the Court refused to accept any of them in evidence on the Government's objection (R. 529) on the basis of its ruling that since in Uebersee's trial the existence of the usufruct was tried under German law the petitioner was collaterally estopped from trying his interest in Uebersee's shares, including the question whether the usufruct *in rem* was maintained, under Swiss law (R. 529-536).

that when this Court *vacated* (343 U. S. at 213) the judgment upon Uebersee's trial in order to permit petitioner to intervene there was no final judgment permitting invocation of *res judicata*. The court below also stated that in view of its decision that petitioner was a non-innocent stockholder it did not reach the question as to the value of petitioner's severable interest and petitioner's contention that the District Court erroneously declared inadmissible expert testimony under Swiss law (App. 6a).

The petitioner submits that the decisions of the court below and of the trial court applying *res judicata* and German law to deny petitioner a trial *de novo* of his interest in the property under Swiss law constituted not only a failure to follow the direction of this Court implicit in remand of the case for trial of petitioner's interest but also constituted a serious misapplication of the doctrine of *res judicata* or collateral estoppel and of the rules of conflict of laws depriving petitioner of a determination of his substantial property interests in Uebersee's shares and in the vested property which should be reviewed by this Court for the following reasons:

A. *"Final" judgment.*—There was no "final" judgment after this Court vacated the judgment after Uebersee's trial in order to allow trial of petitioner's claim and the absence of a final judgment prohibits invocation of *res judicata*. *United States* v. *Munsingwear*, 340 U. S. 36, 38; *Angel* v. *Bullington*, 330 U. S. 183; 307 U. S. 241; *Restatement of the Law of Judgments*, §41, *comment d*. The remand was useless if petitioner was not free to litigate *de novo* all the issues necessary to determine his rights. The trial court, however, held petitioner bound by all the findings which had been made even though the court below and this Court on the former appeal did not affirm certain findings and grounds of decision by the trial court, such

as petitioner's sympathies and actions apart from Uebersee. Thus no appellate review was obtained on the correctness of these findings and yet petitioner was held bound by and not permitted to retry any of them. *Moran Towing Co.* v. *Navigazione Liberia Triestina, S. A.*, 92 F. 2d 37 (C. A. 2); *Restatement of Law of Judgments*, §69, comment b.

B. *Privity of petitioner and Uebersee.*—The court below bases privity between petitioner and Uebersee, subjecting him to an application of *res judicata*, upon petitioner's control of Uebersee's litigation. It is erroneous to apply the general rule of privity in this manner to destroy the distinction between a corporation and its stockholders and make them one party for the corporation's litigation and the stockholders' subsequent individual litigation. The rule is that an individual will not be barred from litigating his own cause of action because similar issues were formerly litigated by the corporation of which he is a stockholder. *Hornstein* v. *Kramer Bros. Freight Lines*, 133 F. 2d 143 (C. A. 3); cf. *American Range Lines* v. *Commissioner*, 200 F. 2d 844 (C. A. 2). The decision of the court below presents conflict on an important question of federal procedural law which should be settled by this Court.

C. *Different ultimate issues.*—Where, as here, the second trial involved a different cause of action, *res judicata* could be invoked only in respect of the ultimate issues, which were different, and not in respect of evidentiary facts. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-599; *The Evergreens* v. *Nunan*, 141 F. 2d 927 (C. A. 2); *Restatement of the Law of Judgments*, §68, comment p. The petitioner submits that the ultimate issue which he sought to try, his property interest in Uebersee's shares and the vested assets, was different from the ultimate issue on Uebersee's

trial, his parents' interest in the property, and it was reversible error to limit the trial of the petitioner's rights by *res judicata*.

D. *Applicability of Swiss law.*—The trial court's ruling declaring inadmissible expert evidence of Swiss law to determine petitioner's property rights was not only an improper application of *res judicata* but also was an erroneous application of the rules of conflict of law. The ruling erroneously applied *res judicata* because on the first trial the issue was whether the usufructuary interest in Uebersee's shares was sufficient to taint Uebersee and the question of a possible division of the property between petitioner, the legal owner, and the usufructuaries did not arise and was not tried or determined. The ruling also erroneously applied accepted principles of conflict of laws by holding without citation of authority that since the original rights in the German gift were governed by German law the rights of the parties were thereafter forevermore governed by German law regardless of the transfer of the proceeds of the gift to a Swiss corporation. But the parties to the gift agreement contemplated transfer of the proceeds to a Swiss holding company which petitioner had contracted to purchase (Fdg. 20, R. 63) and this indicated their intention that Swiss law should be applied to their interests in the Swiss shares. The intention of the parties as to the applicable law will be given effect. *Bozeman* v. *Conn. Gen. El. Ins. Co.*, 301 U. S. 196, 202; *Compania Inv. I.* v. *Industrial Mortgage Bank*, 269 N. Y. 22, 26; Beale, *Conflict of Laws*, §332.2 (1935 Ed.). It is plain that petitioner's obligation to establish a usufruct *in rem* was not to be performed in Germany since the parties desired the property to be outside of Germany, and the place of performance, Switzerland, governs the interests created by the performance. *Zorati SS. Co.* v. *Park Bridge Corp.*, 154 F. 2d 377 (C. A. 2); *Restatement of Conflict of Laws*, §358. Moreover, it

is axiomatic that the law of the place of incorporation governs interests in corporate shares and property. *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428; *Voeller* v. *Nielston Co.*, 311 U. S. 531; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590; *Restatement of Conflict of Laws*, §§53, 183. Furthermore, interests in personal property, such as corporation shares, are governed by the place of location of the property at the time the interests were created and the usufruct *in rem* was created in Uebersee's shares in Switzerland. *Underwood* v. *Phillips Petroleum Co.*, 155 F. 2d 372 (C. A. 10); *Restatement of Conflict of Laws*, §§265, 279.

4. *Denial of due process, just compensation and free speech.*—The petitioner submits, as he did below, that denial of any recovery of his share of the vested assets is denial of due process of law and just compensation under the Fifth Amendment and denial of free speech under the First Amendment to a non-enemy alien present in the United States, and further that denial of a trial of the issue of his property interest in Uebersee's share and in the vested property was a further denial of due process of law (*supra*, p. 17).

## CONCLUSION

For the foregoing reasons the petition should be granted and the petitioner should not be deprived of a judicial determination of his substantial property interests in Uebersee's shares and in the vested property until this Court determines whether the *Kaufman* decision has been correctly applied and whether the petitioner received the trial of his property interests contemplated by this Court's former remand of this case and the opportunity to establish by correctly applicable foreign law his interest in the vested property not subject to the enemy usufruct and therefore recoverable by him as a non-enemy neutral alien.

Respectfully submitted,

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September 18, 1957

# APPENDIX

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13265

FRITZ VON OPEL, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian, APPELLEE

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Appeal from the United States District Court for the District of Columbia

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Decided May 23, 1957

*Mr. Edward J. Ennis,* with whom *Messrs. Thurman Arnold* and *Clifford Forster,* were on the brief, for appellant.

*Mr. Myron C. Baum,* Attorney, Department of Justice, with whom *Messrs. James D. Hill* and *George B. Searls,* Attorneys, Department of Justice, were on the brief, for appellee.

Before PRETTYMAN, WILBUR K. MILLER and FAHY, *Circuit Judges.*

FAHY, *Circuit Judges*: In *Uebersee Finanz-Korp.* v. *McGrath,* 343 U. S. 205, the Supreme Court decided that Uebersee Finanz-Korporation, a Swiss corporation, referred to as Uebersee, was not entitled to recover from

the Alien Property Custodian[1] certain property owned by Uebersee prior to the time it was vested by the Custodian in 1942 under the Trading with the Enemy Act.[2] The property consisted principally of shares of stock of two American corporations. Uebersee, claiming not to be an enemy, in 1945 sued under section 9(a) of the Act to recover the property. The litigation has had a considerable history, as indicated by reference to court decisions cited in the margin.[3] We need review this history only in part.

The Supreme Court held that Uebersee could not recover because it was enemy tainted. The enemy taint was attributed to the ownership and control of Uebersee by Wilhelm and Marta von Opel, husband and wife, both German nationals. But it appeared that Fritz von Opel, son of Wilhelm and Marta von Opel and a citizen of Liechtenstein, held legal title to practically all of the stock of Uebersee and that he might have rights which were entitled to recognition under the principles laid down in *Kaufman* v. *Societe Internationale*, 343 U. S. 156, decided the same day as *Uebersee*. In *Kaufman* the Court held,

> " • • • when the Government seizes assets of a corporation organized under the laws of a neutral coun-

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[1] We use "Alien Property Custodian" and "Custodian" interchangeably and also as including the Attorneys General of the United States who at different times became the successor of the Alien Property Custodian.

[2] 40 Stat. 411 (1917), as amended, 50 U. S. C. App. §§ 1 *et seq.*

[3] *Uebersee Finanz-Korporation* v. *Markham*, 81 U. S. App. D. C. 284, 158 F. 2d 313, *affirmed sub nom. Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480; *Uebersee Finanz-Korporation* v. *Clark*, 82 F. Supp. 602, *affirmed sub nom. Uebersee Finanz-Korporation* v. *McGrath*, 89 U. S. App. D. C. 167, 196 F. 2d 557, *affirmed* 343 U. S. 205; *Uebersee Finanz-Korporation* v. *Brownell*, 121 F. Supp. 420, 127 F. Supp. 42, 133 F. Supp. 613.

try, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected."

To permit a determination of the application of this principle to Fritz von Opel's interest in the stock of Uebersee the Court, while affirming our decision against Uebersee itself, *Uebersee Finanz-Korporation* v. *McGrath*, 89 U. S. 167, 196 F. 2d 557, vacated our judgment and remanded the case to the District Court,

> " • • • for consideration, in the light of *Kaufman* and this opinion, of any application that may be made on behalf of Fritz von Opel within 30 days from the date of remand, and in all other respects the judgment is affirmed." 343 U. S. at 213.

On the remand Fritz von Opel was permitted to intervene in the District Court. The theory of intervener's complaint was that as a nonenemy, a citizen of neutral Liechtenstein, and as the sole beneficial owner of all 100 issued and outstanding shares of Uebersee,[4] he was entitled to all the vested property, or in the alternative to that part determined by the court not to be beneficially owned by enemies within the meaning of the Act. After answer the case was tried before Chief Judge Laws of the District Court, who made findings of fact and entered conclusions of law, followed by judgment for the Custodian and this appeal therefrom.

Among other grounds, which we think we need not consider,[5] the court held that intervener was not an innocent

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[4] 97 of the shares are held for intervener by the Frima Trust Establishment of Vaduz, Liechtenstein, and 3 by members of Uebersee's administrative council as qualifying shares.

[5] These grounds are that intervener was an enemy within the definition of section 2(a) of the Act as "a resident outside the United

stockholder within the meaning of *Kaufman*. Chief Judge Laws stated in his opinion:

> "Enemy influence and benefit permeate the interest of Fritz von Opel. Fritz von Opel is not in a position to assert, like plaintiff interveners in *Kaufman* v. *Societe Internationale, supra,* that he is a mere innocent investor in an ostensibly neutral corporation, with interests hostile to the dominant enemy management, without knowledge the assets in his name were contributing to the resources of enemy nationals." *Uebersee Finanz-Korporation* v. *Brownell,* 133 F. Supp. 615, 622.

If this was a correct conclusion it is dispositive of this appeal, and for the reasons now to be stated we think it was correct.

Enemy nationals, Wilhelm and Marta von Opel, had a usufructuary interest in intervener's shares of Uebersee. The court found that under German law a usufructuary had an *in rem* right to the property which included (a) enjoyment of the income; (b) co-possession with the legal owner; (c) a voice in management to preserve the usufructuary's rights, and (d) a right to prevent sale of the property.

This usufruct in the shares of Uebersee, which in turn owned the shares of the two American corporations, arose, according to the court's findings, in the following manner: In 1931 Wilhelm and Marta von Opel by deed of gift, reserving to themselves the usufruct therein or in any property for which exchanged, transferred to Fritz von

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States and doing business in Hungary," that he was an "agent of the enemy and enemy nationals," and therefore enemy tainted, and that his severable interest in the property was presently of no value.

Opel 600 shares of a German corporation, Adam Opel, A.G. Twenty per cent of all dividends and interest on the stock would accrue under the gift instrument to Fritz von Opel. In October, 1931, Fritz von Opel, then residing outside Germany and acting as attorney-in-fact for his father Wilhelm, sold the 600 shares to General Motors Corporation. He received therefor American currency and securities, to obtain which was one of the reasons for the original transfer of the 600 shares to Fritz von Opel. The proceeds of this sale were transferred to Uebersee and were invested by it, principally by purchase of the shares of stock in the American corporations the value of which, at least in part, is now claimed by intervener as an innocent stockholder of Uebersee. In 1935 ninety-seven of the 100 shares of Uebersee had been issued to intervener. In 1935 he had placed these shares in a safe deposit box in a Swiss bank and had delivered the key to an agent of his father. The District Court found that under German law this constituted valid delivery of the usufruct property—purchased with the proceeds of the Adam Opel stock—and completed creation of the usufruct.

The court also found that the agent of Wilhelm who received delivery of the property subject to the usufruct also exercised for his principal control over the investments and activities of Uebersee,[6] and that it was through this arrangement, of which the usufruct was an important part, that Uebersee was found to be affected with enemy taint.[7]

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[6] Wilhelm von Opel died during the course of this litigation, but no legal materiality attaches in this case to his death.

[7] The findings to which we have referred were all made by the District Court in *Uebersee-Finanz Korporation* v. *Clark*, 82 F. Supp. 602, ultimately affirmed by the Supreme Court, *Uebersee Finanz-Korp.* v. *McGrath*, *supra*.

The situation above described differentiates this case from *Kaufman*. The stockholders who were there authorized to intervene alleged that they were not part of the dominant management group through which the corporate entity was admittedly tainted. The taint was caused solely by other shareholders, holding other interests in the corporation. Here the taint affecting Uebersee came to the corporate entity through the shares of which intervener was the legal owner. The *Kaufman* principle here pertinent presupposes that the interests held by the intervening stockholders will be free and clear of enemy taint once they are separated from the corporate entity, while intervener's interests are tainted even when separated from Uebersee, as the taint reaches the corporation through his shares rather than reaching his shares through the corporation. Nor did the enemy control over the American business enterprises arise entirely by the acts of others, as was alleged in *Kaufman*. The facts previously set out show that intervener through his arrangements with Wilhelm and Marta von Opel was part and parcel of the means by which the effective control of Wilhelm over the vested property was secured. Without the participation of intervener in these arrangements at least this form of control would not have been possible. These factual differences we think are controlling.

Our decision that intervener is not entitled to recover any part of Uebersee's assets as an innocent stockholder of Uebersee is based on the facts and reasons stated above. We have assumed for present purposes that he was not an enemy within the definitions of the Act and our position is altogether aside from intervener's personal sympathies, habits, and activities unrelated to the assets of Uebersee. Moreover, we do not reach any question as to the value of intervener's severable interest, since we hold there is no severable interest he can recover.

The District Court held under the doctrine of *res adjudicata*[8] that appellant was bound in the present case by the findings of fact and conclusions of law in the litigation which had eventuated in the decision of the Supreme Court in *Uebersee Finanz-Korp.* v. *McGrath, supra,* holding Uebersee to be enemy tainted.[9] The District Court did not, however, foreclose additional evidence on the issue of enemy status, enemy taint, and the value of intervener's severable interests. See *Uebersee Finanz-Korporation* v. *Brownell,* 121 F. Supp. 420.[10]

The factual basis for our decision that intervener is not an innocent stockholder is his relationship to the enemy taint affecting *Uebersee.* This corporation was found to be tainted because intervener's parents, German nationals, had an *in rem* right in and control over its shares, held in interveher's name. The nature of that right, the resulting control over the corporation, and intervener's active participation in the events which led to establishment of the right cause us to hold that intervener is not an innocent stockholder. The issues regarding the nature and establishment of the enemy interests which resulted in Uebersee's taint were tried in the cor-

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[8] *Res adjudicata* is used here in a general sense. When, as in the present case, the cause of action is different from the one involved when the issues in question were previously litigated it is referred to more accurately as estoppel by judgment or collateral estoppel. *Commissioner* v. *Sunnen,* 333 U. S. 591.

[9] See *Uebersee Finanz-Korporation* v. *Clark,* 82 F. Supp. 602, *affirmed Uebersee Finanz-Korporation* v. *McGrath,* 89 U. S. App. 167, 196 F. 2d 577.

[10] The District Court, in *Uebersee Finanz-Korporation* v. *Brownell,* 127 F. Supp. 42, declared inadmissible expert testimony on Swiss law as to the value of intervener's severable interest, on the ground that the parents' rights had arisen under German law. Appellant contends that this was an improper application of *res adjudicata.* We need not decide this point because, as we have said, we do not reach the question of the value of the intervener's severable interest.

poration's litigation. Intervener may not re-litigate those issues in this proceeding. For, as the District Court held, and as cannot be disputed, he

> "• • • had full control of the litigation of the suit brought by the • • • corporation. Not only did he appear as a witness and cooperate in prosecution of the suit, but he retained counsel, assisted in pretrial and trial proceedings and the motion for a new trial, and authorized prosecution of the appeal as plaintiff's representative. The record shows active control, participation and assistance to protect his asserted proprietary and financial interests. This establishes clearly his privity with plaintiff [Uebersee] in the original action. • • •" *Uebersee Finanz-Korporation* v. *Brownell*, 121 F. Supp. 420, 425.

He is accordingly bound, not because he is a stockholder of the Uebersee corporation, but because he controlled the litigation, in which he had a financial interest, though the suit had been brought in the name of another. *Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475; *Lovejoy* v. *Murray*, 3 Wall 1, 18; cf. *Buzard* v. *Helvering*, 64 App. D. C. 268, 272, 77 F. 2d 391, 395.

We cannot accept appellant's contention that *res adjudicata* does not apply for the reason that the *Uebersee* litigation did not result in such a final judgment as is essential to give rise to *res adjudicata*. It is of course true there was no final judgment as to intervener's right to recover if he could bring himself within *Kaufman*. But in holding open this question the Supreme Court expressly affirmed our decision as to the corporation. The Supreme Court's judgment in that regard was final. This is so notwithstanding the Court at the time of affirming also vacated the judgment for the sole pur-

pose of enabling appellant to seek recovery in his own behalf. The true legal situation is that there was a final adjudication by the Supreme Court of the matters in issue and decided with respect to Uebersee. These are the matters as to which *res adjudicata* applies to intervener and which form the basis for our present decision.

One further contention should be considered. Intervener says that as a matter of law a stockholder in a neutral corporation is an "innocent stockholder" within the *Kaufman* decision if he is either an American citizen, which intervener does not claim to be, or is a nonenemy alien, that is, an alien neither resident in enemy territory nor resident outside the United States and doing business within enemy territory, which he does claim to be. He relies upon statements in the court's opinion in *Kaufman* which refer, at times, to nonenemy aliens as those who may obtain a share of the assets of a corporation in which they hold stock. It is true that only a nonenemy may sue under the Act, but it does not follow that all nonenemies who may sue may recover. The nonenemy character essential to his right to sue does not entitle a stockholder of an enemy tainted corporation to recover on the basis of his stock interest without showing his own "innocence." Reference in *Kaufman* and *Uebersee* to the right of one not an enemy as defined in section 2 to recover does not convey the full meaning of *Kaufman*. As we construe that decision insofar as here pertinent nonenemy status alone is insufficient, in the case of a stockholder of an enemy tainted neutral corporation, to entitle him to recover assets of the corporation commensurate with his stock ownership. Intervener is not within *Kaufman* because his association with the enemy taint of the corporation in which he holds his stock was a non-innocent association. It was through his shares and

through arrangements to which he was a party that the taint attached to the corporation.[11]

*Affirmed.*

[11] This makes it unnecessary to consider whether or not he was an enemy within the definition of that part of section 2(a) which includes among enemies an individual resident outside the United States who does business within the territory of any nation with which the United States is at war. The District Court found intervener to be within this definition. See note 5 *supra*.

# GIFT AGREEMENT

(Exhibit 5 of Plaintiff Uebersee upon first trial, R. 1805-1807, 343 U. S. at 207)

Ruesselsheim, October 5, 1931

I, the undersigned Geheime Kommerzienrat Dr.ing.h.c. Wilhelm von Opel, declare that my property and the property of my wife Marta, nee Bade, are community property. Shares numbered 1 to 600 of the Adam Opel Aktiengesellschaft in Ruesselsheim, Main, having a par value of RM 6,000,000.00 (six million), are part of our community property. It is our common desire that these stocks remain with the male line of our family in order to preserve a personal connection between the hearers of the name of Opel and the work of our father Adam Opel.

In view of the premises I, with the consent of my wife, make a gift from our community property to my son Fritz von Opel of the shares owned by us and mentioned above, of the Adam Opel Aktiengesellschaft in Ruesselsheim, Main, Nos. 1 to 600, having a par value of Rm 6,000,000.00 (six million). These stocks are deposited at present with the bank.

I, the undersigned Fritz von Opel, accept the gift.

I, Wilhelm von Opel, herewith transfer title to these shares to our son Fritz von Opel by assigning to him our claim for the delivery of these shares to us.

The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20% of all dividends and interest received will accrue to Fritz von Opel.

If the parents Opel should predecease Fritz von Opel, the above described gift shall be considered as an advancement and shall be deducted from his share in such property as might be inherited by him or his sister, Mrs. Elinor Sachs, nee von Opel, or in case of her prior death, by her issue.

For this purpose the value of the shares shall be fixed at the value at the time when the duty to account for the advancement arises.

If this value is higher than the present value, the higher value shall apply, if it is lower, then the lower value.

In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor.

If the shares should be sold or exchanged against other property the proceeds from such sale or the property taken in exchange shall be substituted for the shares, after the usufruct of the parents Opel has been safeguarded. All provisions stipulated above will then fully apply to such substituted property.

If Fritz von Opel predeceases his parents without leaving legitimate issue, the gift executed by this document will become void. The stocks or the property substituted therefor including the income accrued but not drawn will then revert to the parents Opel or the surviving parent.

sgd. Fritz von Opel sgd. Dr. Wilhelm von Opel

I, the wife Marta von Opel, nee Bade, agree to the above agreement.

sgd. Marta von Opel nee Bade